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Supreme Court, U.S.
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No. 97-546

JAN 9 1998

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

COLLEEN E. NEWPORT
AND JAMES F. NEWPORT
-- PETITIONERS

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SUPREME COURT, U.S.

VS.

MISSOURI ARMY NATIONAL GUARD &
ADJUTANT GENERAL PENDERGRASS
-- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITIONERS' RULE 40 MOTION FOR VETERAN TO PROCEED WITHOUT COSTS AND ON PAPERS

The petitioners, a ***pro se*** veteran and his testifiant spouse suing to establish federal veterans reemployment rights over the State of Missouri pursuant to 38 U.S. C. 2021 (1990), asks leave to file their Petition for a Writ of Certiorari without costs and on

31 pp

written papers under the provisions of Supreme Court Rule 40 and 38 U.S.C. § 2022[1] (now 38 U.S.C. § § 4323).

SUGGESTIONS

This *retailitory* discharge appeal action against the State of Missouri lies under the organic whole of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 which as stated in footnote 1 *supra* was reenacted, amended and recodified as the USERRA 38 U.S.C. §§ 4301 et seq.

Petitioners have been granted leave in this action pursuant to 38 U.S.C.A. § 4302 formerly 38 U.S.C. § 2022 to proceed without costs in the Western District of Missouri, Western Division.. *See generally* Fishgold v. Sullivan Drydock & Repair Corp., 328 US 275, at **284**; 90 L.Ed 1230, 66 S.Ct 1105, 167 ALR 110 (1946) which holds that application for benefits which initiates the no taxation of cost provisions is to the District Court.

> Congress has provided in § 8 (e) of this Act that when **a veteran applies to the District Court for the benefits of the Act** "no fees or court costs shall be taxed" against him.

---

[1] The USERRA is a reenactment and recodification of veterans reemployment rights laws starting with Section 8 of The Selective Training and Service Act of 1940; 54 Stat. 890; later The Military Selective Service Act of 1967 as 50 U.S.C. S. Appx. § 459; subsequently The Vietnam Era Veterans' Readjustment Assistance Act of 1974 as 38 U.S.C. §§ 2021 et seq., and finally the Uniformed Services Employment and Reemployment Rights Act Of 1994 (USERRA), [redesignated 38 USCS §§ 2021--2027 as 38 USCS §§ 4301--4307].

Fifty years of controlling Supreme Court precedence Fishgold v. Sullivan Drydock & Repair Corp., 328 US 275, 90 L.Ed 1230, 66 S.Ct 1105, 167 ALR 110. (1946) and the holdings of several lower court cases support that . *See also* Campbell v Roach, et al , 741 F. Supp. 566 (D.C. Md,1990) District Judge Motz held at 567;

> "I am satisfied that the no-taxation-of-costs provision of [38 USC] 2022 is intended to apply to all court proceedings." including the entry of an order permitting him [Applicant for benefits under Vietnam Era Veterans Readjustment Assistance Act.] to proceed on appeal without prepayment of costs.

but see Congrove v. St. Louis-San Francisco Ry. Co., No. 76-CV547-W-4-6.(W.D.Mo. 1980), 106 L.R.R.M. 2194; 89 Lab. Cas. (CCH) P12,347 [costs assessed against the ***United States*** in a closely decided but unsuccessful VRRA action.] *See also* Newport v. Michelin Aircraft Tire Corp., 851 F. Supp. 1406 at 1408.

The new language of 38 U.S.C. § 4323 (formerly 38 U.S.C. § 2022) states:

> **(d)(3) (A) No fees or court costs shall be charged or taxed against any person claiming rights under this chapter [38 USCS §§ 4301 et seq.].**

Further, The anti discrimination clauses of 38 U.S.C. § 4311 (c)(2) states:

> (2) The prohibition in paragraph (1) shall apply with respect to a person regardless of whether that person has performed service in the uniformed services and shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C).

Colleen Newport as a testfiant in Newport v. Ford Motor Co., W.D. Mo. #92-0287-CV-W-3 has suffered an injury to a protected property interest in her vested interest in her spouse James Newport's retirement benefits that he would accrue absent the alleged

retaliatory discharge. The Complaint (Doc. 10) at page 6 shows Colleen Newport has standing under 38 U.S.C. § 4311 (2) as a testfiant:

Each and every defendant had knowledge that James F. Newport and Colleen E. Newport were exercising first amendment rights and rights under 38 U.S.C. § 4323 to testify in the United States District court under the USERRA. ¶ 1 at Page 8 of (Doc. 10) "*in* Newport v. Ford Motor Co., *W.D. Mo. #92-0287-CV-W-3,(s) 8th Cir. #95-1407 WMKC.*"

Congress adopted into the USERRA the body of case law of the VRRA and it's predecessor statutes The Selective Training and Service Act of 1940 and the Military Selective Service Act of 1967 and wanted to ensure that those principles of law held in *Fishgold supra* including the no taxation of costs were enforced: *See* House Report No. 103-65, 103rd Cong. 1st Sess. at 24, reprinted in 1994 U.S. Code Cong. & Ad. News at 2452.

> Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be liberally construed. Fishgold v. Sullivan Drydock & Repair Corp., 328 US 275, 285 (1946): Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977).

See Winders v. People Exp. Airlines, Inc., 595 F.Supp. 1512, 1519 (1984). "Although the act is to be liberally construed *it is not to liberally construed to defeat its own purpose*." (emphasis added). The proper application of the no taxation of costs or fees provision should recognize *" that each section has its own separate and distinct purpose and must be considered as complementary rather than mutually exclusive*

enactments favoring the plaintiff [reservist]" Breeding v. TRW Ross Gear Div, 477 F.Supp. 1177, 1180 (1979).

Supreme Court Rule 40 is a recognition that Petitioners do not sue simply as an aggrieved applicants "but as a veteran [reservist] asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces." Mc Kinney v. Missouri-Kansas-Texas R. Co., 357 US 265, 269, 2 L.Ed. 1305, 78 S.Ct. 1222 (1958).

Currently the no taxation of costs provision of the veterans reemployment rights Acts (USERRA) is at 38 U.S.C. §4322(c). *See* Jordan v. Jones, No. 95-40488, 1996 U.S. App. LEXIS 12394 (2nd Cir. 1996) which held:

> However, the legislative history accompanying the enactment of a subsequent provision of the VRRA, which applies to reemployments initiated on or after the first day after the 60-day period beginning on Oct. 13, 1994, convinces us that Congress intended @ 4302 to prevent any person claiming [*12] benefits under the VRRA from being assessed costs. In describing the new provisions, the Senate Report states:
>
> *New section 4322(c)(2) would provide that no fees or court costs could be charged or taxed against any individual pursuing a claim of a violation of his or her [rights under the VRRA]. If that individual were the prevailing party, the court could, in its discretion, award the individual reasonable attorney fees, expert witness fees, and other litigation expenses when not represented by the Attorney General. The prohibition against charging fees or costs exists in present section 4302. The Committee bill would authorize the award of attorney fees, expert witness fees, and other litigation expenses as a further effort to make service members whole and not have them suffer any loss in realizing their reemployment rights.*
>
> S.Rep. No. 158, 103d Cong., 1st Sess. (1993). Accordingly, we conclude that Congress intended @ 4302 to prohibit district courts from awarding costs against a person who is pursuing a claim of a violation of his rights under the VRRA irregardless of who represents him.

Petitioner's declaration in support of this Rule 40 motion showing their standing as a veteran/reservist/testifiant suing to establish reemployment rights under the USERRA is attached hereto.

Wherefore all the above reasons Petitioners prays the Supreme Court of the United States GRANT their Motion to Proceed without Costs pursuant to 38 U.S.C. § 4323 formerly 38 U.S.C. § 2022 and on Papers under Rule 40.

Most Respectfully Submitted,

Colleen E. Newport

James F. Newport, *pro se*
1405 Kingston Rd.
Blue Springs, Missouri 64015
#816-228-2530

DECLARATION

I declare pursuant to 28 U.S. C. § 1746 under the penalties of the perjury laws of the United States that I am a member or past member of the United States Reserve Components and a veteran seeking to obtain the benefits of the veterans reemployment rights acts (VERA/USERRA). This statement is true and accurate to the best of my knowledge and belief.

James F. Newport, *pro se*
1405 Kingston Rd.
Blue Springs, Missouri 64015

DECLARATION

I declare pursuant to 28 U.S. C. § 1746 under the penalties of the perjury laws of the United States that I am a *testifiant* on behalf of a member or past member of the United States Reserve Components and a veteran seeking to obtain the benefits of the veterans reemployment rights acts (VERA/USERRA). This statement is true and accurate to the best of my knowledge and belief.

Colleen E Newport
1405 Kingston Rd
Blue Springs, MO 64015

Colleen E. Newport

Colleen E. Newport, *pro se*
1405 Kingston Rd.
Blue Springs, Missouri 64015

CERTIFICATE OF SERVICE

I declare pursuant to 28 U.S. C. § 1746 under the penalties of the perjury laws of the United States that two true and accurate copies of the above was mailed first class postage prepaid on this day of November 7, 1997 to:

Jeremiah W. (Jay) Nixon
Attorney General of Missouri,
Theodore A. Bruce
Assistant Attorney General
221 W. High, 4th Floor
Jefferson City, MO 65102

James F. Newport

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SEP 10 1997
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No. 97-846

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

COLLEEN E. NEWPORT
AND JAMES F. NEWPORT
-- PETITIONERS

VS.

MISSOURI ARMY NATIONAL GUARD &
ADJUTANT GENERAL PENDERGRASS
-- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHT CIRCUIT

Petitioners
COLLEEN E. NEWPORT & JAMES F. NEWPORT (pro se)
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BLUE SPRINGS, MISSOURI 64015
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IN THE
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COLLEEN E. NEWPORT
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-- PETITIONERS

VS.

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-- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

QUESTIONS PRESENTED

1. Whether Congress has Constitutionally abrogated the States' sovereign immunity under the Uniformed Services Employment and Remployment Rights Act of 1994 [1] to

[1] Before their recodification in 1974, the veterans' re-employment rights provisions were codified at 50 U. S. C. App. § 459 (1970 ed.) (§ 9 of the Military Selective Service Act of 1967). *See* Coffy v. Republic Steel Corp., 447 U.S. 191, 194, n. 2. The complaint in this action also references the Veterans Reemployment Rights Act [VRRA], codified at 38 U.S.C. §§ 2021-27, as amended. The VRRA was renumbered Chapter 43, sections 4301-07 by Pub. L. 102-568, Title V, § 506(a), Oct. 29, 1992, 106 Stat. 4340. Section 2021 was transferred without change to § 4301. The VRRA was subsequently amended by the Uniformed Services Employment and Reemployment Rights Act [USERRA], codified at 38 U.S.C. §§ 4301-33, effective October 13, 1994. The *amendments* of the USERRA generally applies to actions initiated on or after a 60-day period after enactment of the Act, October 13, 1994. Pub. L. 103-353, § 8, Oct. 13, 1994, 108 Stat 3150.

maintain discipline and control of the Armed Forces thus providing an exception to the *Feres*[2] doctrine.

2. Whether the State of Missouri consents to suit under the RSMo 40.490 which states in relevant part:

Reemployment Rights of Persons Ordered to Active Duty:

> Members of the state military forces of this state who are ordered to active state duty by the governor shall, upon being relieved from such duty, be entitled to the same reemployment rights provided by Title 38 of the United States Code, the Revised Statutes of Missouri, and all amendments thereto.

LIST OF PARTIES

All parties appear on the caption of the case on the cover page

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I. The Eight Circuit's Application of 38 U.S.C. §4311 (b) to this case was incorrect in view of both the clear statutory language and the legislative history of the Uniformed Services Employment and Reemployment Rights Act of 1994

[2] *See* Feres v. U.S. 340 U.S. 135

II.

CONCLUSION ..... **pg. 12**

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(Appendix. **A**) May 12, 1997 *per curiam* decision of Honorable Judges McMillian, Fagg and Loken of the 8th Circuit Court of Appeals in **No. 97-1212**

(Appendix **B**) June 13, 1997 Denial of Rehearing and Rehearing *En Banc* by the 8th Circuit

(Appendix **C**) July 17, 1996 Decision of the United States District Court for the Western District of Missouri.

(Appendix **D**) Supreme Court's Receipt of Defective Petition on Sept. 10, 1997.

TABLE OF AUTHORITES

CASES

Perpich v. DOD, (1990) 496 US 334, 110 L.Ed. 312, 110 S.Ct. 2418 pg.5
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STATUTES AND RULES

Fed.R.Civ.P. 56(c).
Recognition of National Guard and Reserve Forces. Act, Sept. 8, 1982, P.L.
The Military Selective Service Act of 1967 as 50 U.S.C. S. Appx. § 459,
The Selective Training and Service Act of 1940, 54 Stat. 890,
The Vietnam Era Veterans' Readjustment Assistance Act of 1974 as 38 U.S.C. §§ 2021 *et seq*.
Uniformed Services Employment and Reemployment Rights Act Of 1994 (USERRA), [redesignated 38 USCS §§ 2021--2027 as 38 USCS §§ 4301--4307].
Veterans' Benefits Improvement and Health-Care Authorization Act, Pub.L No. 99-576, Title II, 331, 100 Stat. 3248 Oct. 28, 1986

OTHER AUTHORITIES

1994 U.S. Code Cong. & Ad. News, 108 STAT. 3153
32 CFR Ch. 1 (7-1-92 Edition) § 76
86 Cong. Rec. 10095 (1940) (remarks of Sen. Sheppard)
H.R. Rep. No.1069, 94th Cong., 2d Sess. 325, reprinted in 1976 U.S. Code Cong. & Admin.
News 1034, H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983).) pg. i.
Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966).
Hearings before the House Committee on Military Affairs on H.R. 10132, 76th Cong., 3d Sess. 86 (1940) (cited in Special Monograph No. 2, The Selective Service Act: Its Legislative History, Amendments, Appropriations, Cognates and Prior Instruments of Security 569 (1954) (hereinafter The Selective Service Act).
House Report No. 103-65, 103rd Cong. 1st Sess. at 24, reprinted in 1994 U.S. Code Cong. & Ad. News
Sen.76th Cong. Rec. 3rd Session page 10108 August 9, 1940.
Senate Report No. 103-158, 103rd Cong. 1st Session
132 Cong. Rec. 29226 (Oct. 7, 1986)(copy attached as H9297)(statement of Cong. Montgomery)
Joint Explanatory Statement of both the House and Senate Committees (Conference Report), reported at 140 Congressional Record H9142-9143, and reprinted in 1994 U.S. Code Cong. & Ad. News at 2515

Petitioners Colleen E. Newport and James F. Newport (*pro se*) respectfully pray that a writ of *certiorari* issue to review the decision of the United States Court of Appeals for the Eight Circuit in this case.

OPINIONS BELOW

The May 12, 1997 opinion of the Court of Appeals affirming the judgment of the Western District of Missouri is unreported (Appendix. **A**). A timely petition for rehearing

and rehearing *en banc* was filed. The petition for rehearing rehearing and rehearing *en banc* was denied June 13, 1997 (Appendix **B)**

The finding of fact and conclusions of law of the United States District Court for the Western District of Missouri (Appendix.**C**) are not reported.

JURISDICTION

The date that on which the United States Court of Appeals decided my case was May 12, 1997. (Appdx. A) a timely petition for rehearing was denied on June 13, 1997 (Appendix B)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and in accordance with Rule 10 of Rules of this Court.

STATUTORY PROVISIONS INVOLVED

The specific provision at issue (A) in this case is 38 U.S.C.§ 4323 (7) which states: ***A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.*** [3]

---

[3] Any damages awarded to Newport's would be paid from *federal funds* received by the state of Missouri for operation of the MOARNG avoiding the Constitutional impediments to drawing moneys from the state treasury. *See* Perpich v. DOD, (1990) 496 US 334, 110 L.Ed. 312, 110 S.Ct. 2418. "*The Federal government provides virtually all of the funding, the material and the leadership for the State Guard units.*" . *See* Perpich v. DOD, (1990) 496 US 334, 351, 110 L.Ed. 312, 328, 110 S.Ct. 2418. Both the award of lost wages and benefits and the reinstatement of Newport are appropriate forms of relief authorized by Congress. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, at 456-57, 96 S. Ct. 2666 at 2671-72, 49 L. Ed. 2d 614 (1976).

STATEMENT OF THE CASE

Pro se Petitioner summits this Brief in support of *Writ of Certiorari* to decide if the state of Missouri is subject to the War Powers of Congress to discipline the Armed Forces and consented to veterans reemployment suits under RSMo 40.490.

REASONS FOR GRANTING THE PETITION

It is an essential postulate of The Constitution "Principality of Monaco v. Mississipi, 292 U.S. 313, 322 (1934) the Right to discipline the militia was reserved to Congress.

"Congress intended to protect potential and existing reservists from policies that deter employees from joining the reserves." Boyle v. Burke, 925 F2d 497 (1st Cir 1991)

The case presents an important question of federal supremacy rights to Raise Armies and discipline the Armed Forces under the War Powers reserved to Congress in which the decision of the Eight Circuit:

(a) presents a clear conflict between this case in the 8th Circuit and Perpich v. DOD, (1990) 880 F.2d 11, (8th Cir. 1989) 496 US 334, 351, 110 L.Ed. 312, 328, 110 S.Ct. 2418; Seminole Tribe of Florida v. Florida, 517 US --, 134 L.Ed. 2d 252, 116 S. Ct. -- [No. 94-12] (1996); King v. St. Vincent's Hospital , No. 90-889, 502 U.S. 215 (1991) and draws the line of federal supremacy under Printz v. U.S., No. 95-1478, 518 U.S. ---, (1997)

THE WAR POWER AND CONGRESSIONAL INTENT

Congress forged this statute to met the necessities of war[4] from the Art. 1, Section 8, Clauses 11-13 of the Constitutions' War Powers of Congress. "*The War Power of the federal government is its supreme power. When it is in action it is transcendent.*" Peel v Florida Dept. of Transp. 600 F.2d 1070 at 1081 (CA5, 1979). In the recent decision Seminole Tribe of Florida v. Florida, 517 US --, 134 L.Ed. 2d 252, 116 S. Ct. -- [No. 94-12] the Supreme Court held at 266

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green v. Mansour*, 474 US 64, 88 L Ed 2d 371, 106 S.Ct. 423 (1985) ; and second, whether Congress has acted "pursuant to a valid exercise of power." *Ibid*

The clear plain statutory language of the USERRA shows Congress unmistakably intended to abrogate the States sovereign immunity at 38 U.S.C.§ 4323 (7) which states: ***A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.***

---

[4] In 1940 reemployment provisions were at Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890,. The name of the Act was changed to the Selective Service Act of 1948, see Pub. L. no 80-759, 62 Stat. 604. and in 1951 to the Universal Military Training and Service Act. *see* Pub. L. no 82-51, 65 Stat. 75. In 1967 it was renamed The Military Selective Service Act of 1967 as 50 U.S.C. S. Appx. § 459 *see* Pub. L. 90-40, 81 Stat. 100 and in 1971 the name was changed to the Military Selective Service Act, *see* Pub. L. No 92-129, 85 Stat. 348, Monroe v. Standard Oil Co., 452 U.S. 549, 554-555 *See also* Hembree v Georgia Power Co., 637 F.2d 423, n.2 (1981) The reemployment provisions of the Military Selective Service Act of 1967 was recodified in 1974 as The Vietnam Era Veterans' Readjustment Assistance Act of 1974 as 38 U.S.C. §§ 2021 *et seq.* , see Pub. L. no 93-508, 88 Stat. 1578

The second part of the inquiry is "*Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate.*" Seminole Tribe of Florida v. Florida, *supra* at 268.

Seminole Tribe of Florida v. Florida, *supra* at 277 in holding *"Even when the Constitution vests in Congress complete law making authority over a particular area, the Eleventh amendment prevents congressional authorization of suits by private parties against unconsenting states."* decided the issue that Congress absent the 14th amendment did not have the right to abrogate states 11th amendment immunities under its U.S. Const. Art. I ***Commerce*** powers in expressly overruling Pennsylvania v. Union Gas Co., *supra.*

However Seminole Tribe of Florida v. Florida, *supra* Commerce powers holding does not extend to the supreme and absolutely essential war powers of Congress by which the states (including the Governer of the State of Missouri) were brought to heel in the Civil War by the most manifest form of the Congressional War Power; the force of arms.

That the provisions of the 13th and the 14th amendment reciprocally impose the War power on the states as the War power imposed the 13th and 14th amendments on the secessionist states:

> . (I)t may be said that the power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defense and the perpetuity of our liberties. These rest upon the preservation of our nation.

Lichter v. United States, 334 U.S. 742, 781, 68 S. Ct. 1294, 1314-15, 92 L. Ed. 1694 (1948). Thus to the extent that the federal War Power is used to impose federal supremacy over the states, laws designed to protect the integrity of the Armed Forces are *the ultimate embodiment of the 14th amendment* and flow equally from the War power as well as § 5 of the fourteenth amendment. The arguement is that when Congress operates under the War power it automatically incorporates the Fourteenth Amendment to apply that power to the states. These two powers, exercised together, supersede the states' immunity. "*Congress" army power is plenary and exclusive*." Perpich v. DOD, 880 F.2d 11, 17-18 (8th Cir. 1989) *affirmed* Perpich v. DOD, (1990) 496 US 334, 351, 110 L.Ed. 312, 328, 110 S.Ct. 2418

In conclusion the district court erred in dismissing Count I of the complaint as 38 U.S.C. § 4323 is a valid exercise of the Art I, § 8, cl 16 War power and § 5 of the fourteenth amendment *to abrogate the immunity of the state of Missouri*.

On October 13, 1994, the Uniformed Services Employment and Reemployment Rights Act Of 1994 (USERRA) replaced The Vietnam Era Veterans' Readjustment Assistance Act of 1974. It is worthy of note that the President of the United States is the Commander in Chief of the officers of the National Guard pursuant to Article 2, § 2 of the U.S. Constitution.

IMPACT OF A DECISION ON THE NATIONAL DEFENSE

"[T]he implementation of the Total Force policy, under which members of the Reserve Components[5] have been tasked with greater responsibilities for every phase of military preparedness, has rendered the current structure of the reemployment rights provisions somewhat antiquated and cumbersome." House Report No. 103-65, 103rd Cong. 1st Sess. at 24, reprinted in 1994 U.S. Code Cong. & Ad. News at 2451. Rep. Sonny Montgomery as Chairman of the House Veterans Affairs Committee on The Veterans' Benefits Improvement and Health-Care Authorization Act, Pub.L No. 99-576, Title II, 331, 100 Stat. 3248 Oct. 28, 1986 Amendments to 38 USC 2021(b)(3) predecessor to 38 U.S.C. 4311 that this ***discrimination*** protection of the reservist was to *keep fully manned the National Guard and Reserve as critical components of the Armed forces* by removing discriminations as a major reason Reservists and National Guardsmen leave the Reserve service. *See* 132 Cong. Rec. H9297 (daily ed. Oct. 7, 1986).

THE IMPORTANCE OF THE RESERVE FORCE TO NATIONAL DEFENSE

See Recognition of National Guard and Reserve Forces. Act Sept. 8, 1982, P.L. 97-252, Title XI, § 1130, 96 Stat. 759, provides:

"(a) The Congress finds that--

---

[5] Further "The United States Army Reserve, constitutes an integral part of the Army, and the required qualifications of a soldier are the same regardless of whether he is on active duty or in the reserves.: Olenick v. Brucker, D.C. D.C. 1959, 173 F.Supp. 493, set aside on other grounds, 273 F.2d 819, 107 U.S. App. D.C. 5.

"(1) the National Guard and Reserve Forces of the United States are an integral part of the total force[6] policy of the United States for national defense and need to be ready to respond, on short notice, to augment the active military forces in time of national emergency;

Thus Congress has stated that the *national* defense is the rational for the USERRRA's protections of the members of the national guard.

The Secretary of Defense has published at 32 CFR Ch. 1 (7-1-92 Edition) § 76 regulations that state:

Mobilization of The Ready Reserve

§ 76.5 Policy.

DoD policy directs an increasing reliance on the Ready Reserve to meet wartime requirements. In certain contingencies, plans call for the deployment of some Selected Reserve units and individuals before active units.* * *

(a) Manpower. Achieving manpower goals for both active and Reserve Components is essential for an effective mobilization process. Personnel shortages and military skill imbalances affect wartime capabilities of the total force, not just the DoD Component possessing such deficiencies. * * *

It was clearly stated by Congress in H.R. Rpt 94-1069 94th Cong. 2d Sess. at pg. 10:

The "Total Force Policy" dictates that all available forces, U.S. Active Forces, U.S. Guard and Reserve Forces, and the forces of our allies--would be considered in determining the Defense needs to meet future contingencies. Our national policy of greater reliance on the Guard and Reserve is resulting in missions being assigned to the Reserve forces that were previously the sole responsibility of the Active Forces. In some cases the capability to perform certain missions will be primarily the responsibility

---

6 Perpich v. U. S., 880 F.2d 11, 15,(8th Cir. 1989) Submitted, June 28, 1989, Filed, As Corrected August 14, 1989, at page 15;
Under the "Total Force" structuring of American military forces, reserve components, including the National Guard of the United States, are fully integrated with regular active forces in the national defense. See H.R. Rep. No.1069, 94th Cong., 2d Sess. 325, reprinted in 1976 U.S. Code Cong. & Admin. News 1034, H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983).)

> of the Reserve Forces. In carrying out these missions, **the volunteer potential of the Reserve will continue to be fully exploited.** (emphasis added)

The Surpeme Court has recognized that vital need of the nation's total force to be ready to respond quickly and effectively [in the context of draft legislation but equally applicable here] *See* United States v. O'Brien, 391 U.S. 367, 381 (1968).

> We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances.

The national security implications of this suit is good cause to hear this case. The Supreme Court should carefully examine the 8th Circuit's extension of *Feres* to bar application of the USERRA as to its impact on federal control over discipline of the state National Guard. The point is, that the National Guards ***supreme*** loyalty is to the federal government. The USERRA is the result of a proper exercise of Congressional power to give a statutory remedy to help preserve and protect the federal loyalty, morale and discipline of the Armed Forces to ***provide for the common defense of a more perfect union*** by making the federal courts available to ***any person***, i.e. members of the state militia to include technicians, for state National Guard violations of federal USERRA rights.

CONCLUSION

"*Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking.*" *See* Pennsylvania v. Nelson, 350 U.S. 497 at 507; 76 S. Ct. 477 at 483; 1956 U.S. LEXIS 1730; 100 L. Ed. 640.

For all the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date 11-6-97

Colleen E. Newport and James F. Newport, *pro se*
1405 Kingston Rd.
Blue Springs, Missouri 64015
#816-228-2530

APPENDIX

(Appendix. **A**) May 12, 1997 *per curiam* decision of Honorable Judges McMillian, Fagg and Loken of the 8th Circuit Court of Appeals in **No. 97-1212**

(Appendix **B**) June 13, 1997 Denial of Rehearing and Rehearing *En Banc* by the 8th Circuit

(Appendix **C**) July 17, 1996 Decision of the United States District Court for the Western District of Missouri.

(Appendix **D**) Supreme Court's Receipt of Defective Petition on Sept. 10, 1997.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1212WM

Colleen E. Newport; James F. Newport,	*	
	*	
Appellants,	*	Appeal from the United States
	*	District Court for the Western
v.	*	District of Missouri.
	*	
Missouri Army National Guard;	*	[UNPUBLISHED]
Raymond L. Pendergrass, MG,	*	
	*	
Appellees.	*	

Submitted: May 7, 1997
Filed: May 12, 1997

Before McMILLIAN, FAGG, and LOKEN, Circuit Judges.

PER CURIAM.

Colleen E. Newport and James F. Newport appeal the district court's orders dismissing their action against the Missouri Army National Guard and Adjutant General Raymond L. Pendergrass and denying their postjudgment motions. Having carefully reviewed the record and the parties' briefs, we conclude the judgment of the district court was correct. We thus affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 97-1212WMKC

Colleen E. Newport, et al.,

Appellants,

vs.

Missouri Army National Guard, et al.,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 13, 1997

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

COLLEEN E. NEWPORT and, JAMES F. NEWPORT, Plaintiffs,)

vs.) No. 95-1164-CV-W-5

MISSOURI ARMY NATIONAL GUARD, et al., Defendants.)

ORDER

Before this Court are defendant Missouri Army National Guard and defendant Raymond L. Pendergrass' Motion to dismiss and plaintiffs' Opposition. For the reasons stated below, defendants' Motion shall be granted.

Standard

When considering a motion to dismiss, an assumption must be made that all the facts alleged in the complaint are true and a dismissal may be granted "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993); Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). A motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle plaintiff to relief. Conley v. Gibson, 78 S.Ct. 99 (1957).

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DOC. # 24

Pleadings must be examined in the light most favorable to plaintiffs and give them the benefit of all reasonable inferences. Radaszewski v. Telecom Corp., 981 F.2d 305, 310 (8th Cir. 1992).

Analysis

Defendants filed a Motion to Dismiss arguing that plaintiffs' lawsuit should be dismissed because defendants have immunity from suit under the Eleventh Amendment and because the Feres Doctrine protects military decision from the type of judicial scrutiny the plaintiffs seek.

Along with defendants, this Court has had difficulty determining the nature of plaintiffs' cause of action. It is clear, however, that plaintiffs are suing the Missouri National Guard and defendant Pendergrass in his official capacity.[1]

The Eleventh Amendment bars suits for damages by citizens against the State or state agencies. Edelman v. Jordan, 94 S.Ct. 1347, 1357-58 (1974); Quern v. Jordan, 99 S.Ct. 1139, 1143 (1979). "This jurisdictional bar applies regardless of the nature of the relief sought." Pennhurst State Sch. v. Halderman, 104 S.Ct. 900, 908 (1984)(citation omitted). Additionally, the bar applies to state officials sued in their official capacity. Will v. Michigan Dept. of State Police, 109 S.Ct. 2304 (1989).

---

[1]Plaintiffs do not deny this assertion in their Suggestions in Opposition.

Plaintiffs do not dispute that the Missouri Army National Guard is a state agency and that defendant Pendergrass is being sued in his official capacity. Because the jurisdictional bar provided by the Eleventh Amendment applies to any relief sought, it is clear that no relief could be granted in this case and defendants' Motion must be granted.

Further, plaintiffs' claims are barred by the Feres Doctrine. This lawsuit arises out of plaintiff Newport's service in the National Guard. The Feres doctrine established that claims under the Federal Tort Claims Act, negligence claims, claims brought under 42 U.S.C. § 1983, and Bivens claims are nonjusticiable if injuries complained of arise out of the course of service. Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992)(citing Feres v. United States, 71 S.Ct. 153, 159 (1950)).

The law is clear that a plaintiff may not bring a lawsuit that "requires the civilian court to second-guess military decisions." United States v. Shearer, 105 S.Ct. 3039, 3043)(1985)(citations omitted). See also, Chappell v. Wallace, 103 S.Ct. 2362, 2364 (1983)(Court dismissed lawsuit brought by enlisted sailors for racial discrimination); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1005 (8th Cir. 1989)(affirmed court's dismissed lawsuit filed by National Guard officer against superiors for racial and disability discrimination).

Because plaintiffs' claims arise out of plaintiff Newport's guard service, they are nonjusticiable and defendants' Motion must be granted.

Conclusion

For the reasons stated above,

It is hereby

ORDERED that defendants' Motion to Dismiss (doc. #15) is granted. It is further

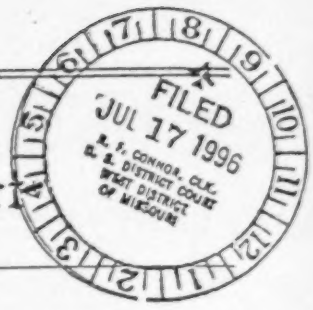
ORDERED that plaintiffs' case is dismissed.

Scott O. Wright

SCOTT O. WRIGHT
Senior United States District Judge

July 17, 1996.

AO 450 (Rev. 5/85) Judgment in a Civil Case ®



United States District Court

WESTERN DISTRICT OF MISSOURI

COLLEEN E. NEWPORT and
JAMES F. NEWPORT,
Plaintiffs,
V.
MISSOURI ARMY NATIONAL
GUARD, et al.,
Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95-1164-CV-W-5

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss (doc. #15) is granted. It is further

ORDERED that plaintiffs' case is dismissed.

Entered On 7/17/96

JUL 17 1996.
Date

R. F. CONNOR
Clerk

(By) Deputy Clerk

ORIGINAL

DOC. # 25

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

September 15, 1997

AREA CODE 202
479-3011

Colleen E. Newport
405 Kingston Road
Blue Springs, MO 64015

RE: Colleen E. Newport, et vir. Missouri Army National Guard, et al.

Dear Ms. Newport:

Your motion for leave to proceed as a veteran and your typewritten petition for a writ of certiorari mailed September 9, 1997, was delivered to this office September 10, 1997, and must be returned since no appendix to the petition was included.

Sincerely,
William K. Suter, Clerk
By:
Francis J. Lorson
Francis J. Lorson
(202) 479-3024

Enclosures

For all the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date 7-8-97

Colleen E. Newport and James F. Newport, *pro se*
1405 Kingston Rd.
Blue Springs, Missouri 64015
#816-228-2530